No. 06-__

IN THE

Supreme Court of the United States

POOH BAH ENTERPRISES, INC., *et al.*,
Petitioners,

v.

CITY OF CHICAGO, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the Supreme Court of Illinois

PETITION FOR WRIT OF CERTIORARI

MICHAEL A. ABRAMSON
ARNSTEIN & LEHR LLP
120 South Riverside Plaza
Suite 1200
Chicago, Illinois 60606
(312) 876-7155

ROBERT CORN-REVERE
Counsel of Record
DAVIS WRIGHT TREMAINE LLP
1919 Pennsylvania Avenue, N.W.
Washington D.C. 20006
(202) 973-4225

DAVID A. EPSTEIN
DAVID A. EPSTEIN, LTD.
30 North LaSalle Street
Suite 2900
Chicago Illinois 60602
(312) 553-1479

Counsel for Petitioners

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

QUESTIONS PRESENTED

1. Whether First Amendment strict scrutiny is required to review the regulation of expressive conduct where the government has not demonstrated that the expression at issue causes adverse secondary effects?

2. Whether a city ordinance regulating sexually-oriented expression may be upheld where the trial court found that the "record is devoid of the existence of even potentially harmful secondary effects?"

3. Whether a reviewing court is required under the First and Fourteenth Amendments to remand for further evidence where it has reversed a mid-trial directed finding of unconstitutionality, and the challenger has not completed its rebuttal of the government's asserted justifications for regulation?

PARTIES TO THE PROCEEDINGS

The petitioners are Pooh Bah Enterprises, Inc., an Illinois corporation; Ace Ent. Co., Inc., an Illinois corporation; Perry Mandera, president of Pooh Bah Enterprises, Inc. and of Ace Ent. Co., Inc.; Lisa D. Sims, Christine E. Hadsall, and Suzanne Lienquist, entertainers and dancers; and Peter Abruzzo, Sr.

The respondents are the City of Chicago, an Illinois municipal corporation; the License Appeal Commission of the City of Chicago; and William D. O'Donaghue, Albert D. McCoy and Irving J. Koppel, Chairman and Commissioners of the Chicago License Appeal Commission.

RULE 29.6 STATEMENT

Pooh Bah Enterprises, Inc., and Ace Ent. Co., Inc., are privately held corporations. None of their shares is held by a publicly traded company.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
PARTIES TO THE PROCEEDINGS	ii
RULE 29.6 STATEMENT	ii
TABLE OF AUTHORITIES	v
OPINIONS BELOW	1
STATEMENT OF JURISDICTION	2
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	3
STATEMENT OF FACTS	6
REASONS FOR GRANTING THE WRIT	11
I. CERTIORARI SHOULD BE GRANTED TO RESOLVE AN ISSUE OF NATIONAL IMPORTANCE THAT HAS DIVIDED THE CIRCUIT COURTS CONCERNING THE APPROPRIATE LEVEL OF SCRUTINY IN EVALUATING CONTENT-CORRELATED REGULATION OF SEXUALLY-ORIENTED EXPRESSION	11
II. CERTIORARI SHOULD BE GRANTED TO REVIEW WHETHER REGULATION OF EROTIC ENTERTAINMENT IS CONSTITUTIONALLY PERMISSIBLE WHEN THE "RECORD IS DEVOID OF THE EXISTENCE OF EVEN POTENTIALLY HARMFUL SECONDARY EFFECTS" AND THE CHALLENGER IS NOT GIVEN A FULL OPPORTUNITY TO CHALLENGE THE GOVERNMENT'S JUSTIFICATION FOR THE LAW	18

TABLE OF CONTENTS—Continued

Page

A. Review Should Be Granted Where the Trial Court Found That the Record is Devoid of Evidence of Harmful Secondary Effects 19

B. This Court Should Grant Review Where Appellate Courts Cut Short Petitioners' Ability to Present Evidence Challenging the City's Justifications for the Law 21

C. Lower Courts Are Divided on the Nature and Extent of Proof Necessary to Support Local Regulation of Sexually Oriented Businesses 23

CONCLUSION 26

TABLE OF AUTHORITIES

CASES Page

Alameda Books, Inc. v. City of Los Angeles, No. CV 95-7771-DDP (C.D. Cal., May 28, 1998) 14
Arkansas Writers' Project, Inc. v. Ragland, 481 U.S. 221 (1987) 13
Ashcroft v. ACLU, 542 U.S. 656 (2004) 11
Barnes v. Glen Theatre, Inc., 501 U.S. 560 (1991) 12, 16, 18, 21
Ben's Bar, Inc. v. Village of Somerset, 316 F.3d 702 (7th Cir 2003) 16, 24-26
Boos v. Barry, 485 U.S. 312 (1988) 15
Cafe 207, Inc. v. St. Johns County, 856 F. Supp. 641 (M.D. Fla. 1994), *aff'd*, 66 F.3d 272 (11th Cir. 1995), *cert. denied*, 517 U.S. 1156 (1996) ... 16
City of Erie v. Pap's A.M., 529 U.S. 277 (2000) ... *passim*
City of Los Angeles v. Alameda Books, Inc., 535 U.S. 425 (2002) ..... *passim*
City of Renton v. Playtime Theaters, Inc., 475 U.S. 41 (1986) ..... *passim*
DiMa Corp. v. Town of Hallie, 185 F.3d 823 (7th Cir. 1999) 17
Encore Videos, Inc. v. City of San Antonio, 330 F.3d 288 (5th Cir. 2003) 24
Flanigan's Enterprises, Inc. v. Fulton County, Georgia, 242 F.3d 976 (11th Cir. 2001) 23-24
Grand Faloon Tavern, Inc. v. Wicker, 670 F.2d 943 (11th Cir. 1982) 24
Heideman v. South Salt Lake City, 348 F.3d 1182 (10th Cir. 2003) 25
Hudson v. Chicago Teachers Union Local No. 1, 475 U.S. 292 (1986) 23
Illusions-Dallas Private Club, Inc. v. Steen, 482 F.3d 299 (5th Cir. 2007) 16, 17, 24

TABLE OF AUTHORITIES—Continued

Page

Joelner v. Village of Washington Park, 378 F.3d 613 (7th Cir. 2004) 12
Minneapolis Star v. Minnesota Comm'r of Revenue, 460 U.S. 575 (1980) 13
Peek-a-Boo Lounge of Bradenton, Inc. v. Manatee County, Fla., 337 F.3d 1251 (11th Cir. 2003), *cert. denied*, 541 U.S. 988 (2004) ... 17
Phillips v. Borough of Keyport, 107 F.3d 164 (3d Cir. 1997) (en banc), *cert. denied*, 522 U.S. 932 (1997) 17
R.V.S., L.L.C. v. City of Rockford, 361 F.3d 402 (7th Cir. 2004) 13, 25
Ranch House, Inc. v. Amerson, 238 F.3d 1273 (11th Cir. 2001) 15
RAV v. City of St. Paul, 505 U.S. 377 (1992) 11-13
Speiser v. Randall, 357 U.S. 513 (1958) 23
U.S. Sound & Service Inc. v. Township of Brick, 126 F.3d 555 (3d Cir. 1997) 16
United States v. Playboy Entertainment Group, 529 U.S. 803 (2000) 11, 15
Virginia v. Black, 538 U.S 343 (2003) 13
White River Amusement Pub, Inc. v. Town of Hartford, 481 F.3d 163 (2d Cir. 2007) 17
Young v. American Mini Theatres, Inc., 427 U.S 50 (1976) 12, 16, 18

STATE CASES

G.Q. Gentlemen's Quarters, Inc. v. City of Lake Ozark, 83 S.W.3d 98 (Mo. 2002) 15
Restaurant Ventures, LLC v. Lexington-Fayette Urban County Government, 60 S.W.3d 572 (Ky. 2001) 25

FEDERAL STATUTES

28 U.S.C. § 1257 2

TABLE OF AUTHORITIES—Continued

RULES Page

Municipal Code of Chicago, § 4-60-140(d) ..... *passim*

CONSTITUTIONAL PROVISIONS

First Amendment ..... *passim*
Fourteenth Amendment 2, 4, 23, 26
Illinois Constitution 4, 6

OTHER AUTHORITIES

G. Gunther, Cases and Materials on Constitutional Law 1373 (10th ed. 1980) 23

IN THE

Supreme Court of the United States

No. 06-___

POOH BAH ENTERPRISES, INC., *et al.*,
Petitioners,

v.

CITY OF CHICAGO, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the Supreme Court of Illinois

---

PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the Supreme Court of Illinois (October 5, 2006), reported at 224 Ill.2d 390 (2006), is included in the Appendix to this Petition, at 1 (hereafter "App."). The unpublished order of that Court denying rehearing (March 5, 2007) is included at App. 64. The dissenting opinion of Justice Freeman to the denial of rehearing, reported at 224 Ill. 2d 390 (March 5, 2007) is included at App. 65.

The unpublished Order of the Appellate Court of Illinois (September 28, 2004) is included at App. 92.

The Memorandum Order and Opinion of the Circuit Court of Cook County Illinois (January 18, 2001) is included at App. 133.

STATEMENT OF JURISDICTION

This Court has jurisdiction to review the decision of the Supreme Court of Illinois pursuant to 28 U.S.C. § 1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, First Amendment:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging freedom of speech, or of the press; or the right of the people to peaceably assemble, and to petition the Government for a redress of grievances."

United States Constitution, Fourteenth Amendment:

> "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law * * *."

Municipal Code of Chicago, § 4-60-140(d):

> "No person licensed under this chapter shall permit any employee, entertainer or patron in any live act, demonstration, dance or exhibition on licensed premises which exposes to public view:
>
> (1) His or her genitals, pubic hair, buttocks, perineum and anal region or pubic hair region; or
>
> (2) Any device, costume, or covering which gives the appearance of or simulates the genitals, pubic hair, buttocks, perineum, anal region or pubic hair region; or
>
> (3) Any portion of the female breast at or below the areola thereof.

For purposes of this section, any of the items described in subsection (d)(1) through (d)(3) shall be considered exposed

to public view if it is uncovered or less than completely and opaquely covered."

STATEMENT OF THE CASE

In 1993, Pooh Bah Enterprises, Inc. ("Pooh Bah") opened a gentlemen's club (the "Club") in an industrial area on the north side of Chicago. Shortly thereafter, the City of Chicago (the "City") initiated administrative proceedings against it to revoke all of its City licenses, including its retail liquor license. The City charged that Pooh Bah had violated § 4-60-140(d) of the Chicago Municipal Code (the "Coverage Ordinance") by permitting various female dancers at the Club to expose portions of their buttocks and the sides of their breasts to patrons' view.

Pooh Bah unsuccessfully attempted to enjoin the administrative proceeding in the circuit court of Cook County based on its state constitutional attack on the ordinance (the "1993 Case"). The denial of a temporary restraining order was affirmed by the Illinois Appellate Court, but the 1993 Case remained pending during the administrative revocation proceedings before the City's Local Liquor Control Commission ("LLCC").

The Commissioner ultimately entered an order revoking Pooh Bah's Chicago liquor, business and entertainment licenses based on his finding that the company had violated § 4-60-140(d). Pooh Bah appealed to the Chicago License Appeal Commission, which affirmed.

Pooh Bah sought judicial review of the administrative findings and revocations in the circuit court of Cook County, in the still-pending 1993 Case. Pooh Bah later amended its complaint to raise First Amendment and other federal law attacks on the Coverage Ordinance in addition to its state law claims.

The City then promptly removed the 1993 Case to the United States District Court, which remanded the state law issues to the Illinois courts, while retaining the federal constitutional issues. A second removal by the City in 1998 was similarly remanded in 1999. The District Court subsequently dismissed the federal court case.

Shortly thereafter, the City brought a second lawsuit against Pooh Bah (the "1999 Case), in which the City sought to enjoin the Club's business as a "nuisance" under Chicago's general nuisance ordinance. (App. 133.) The Illinois Supreme Court defines a public nuisance as a "public exhibition of any kind that tends to the corruption of morals, to a disturbance of the peace or of the general good order and welfare of society." (App. 136.)

The nuisance claim in the 1999 Case was predicated on renewed allegations of the same violations of § 4-60-140(d) as were alleged in the 1993 Case, *i.e.*, exposure of prohibited portions of dancers' buttocks and breasts. In addition, the City alleged in the 1999 Case that a dancer had solicited prostitution at the Club. In defense, Pooh Bah again challenged the constitutionality of § 4-60-140(d), facially and as applied to it, under the Illinois and United States Constitutions.

The 1999 Case went to trial quickly on the City's preliminary injunction request. After the City rested its case and Pooh Bah began to present its evidence, the circuit court granted Pooh Bah's motion for a directed finding. (App. 127, 139.) The circuit court held that the Coverage Ordinance contravened the First and Fourteenth amendments to the United States Constitution and article I, section 4, of the Illinois Constitution of 1970 and therefore § 4-60-140(d) could not serve as a required predicate for a finding that Pooh Bah's Club was a public nuisance (under the City nuisance ordinance). Finding that the City had failed to establish that operation of the Club created a public nuisance in any way,

the circuit court denied the City's motion for a preliminary injunction. (App. 136-42, 153.)

The City then rested its entire case in chief in the 1999 Case, including its defense of the Coverage Ordinance. The parties and the trial court agreed in formal orders: (1) to consolidate the 1993 and 1999 Cases and their evidentiary records, (2) to convert the preliminary injunction directed finding into a final order in both cases, and (3) to stipulate that both parties would retain the right to complete their evidence on remand if the directed finding of unconstitutionality of § 4-60-140(d) were later reversed on appeal. (App. 130) (Consolidation Order); (App. 125) (Partial Judgment Order).

Accordingly, on May 3, 2001, the circuit court entered judgment in favor of Pooh Bah and against the City on the public nuisance claims; reversed the order of the Liquor Appeal Commission affirming the revocation of Pooh Bah's Chicago licenses; vacated the revocation of those licenses; reserved for future consideration various related and subsidiary issues; and made an express finding that there was no just reason for delaying enforcement or appeal. (App. 125-29.)

The City appealed to the Illinois Appellate Court, which held that § 4-60-140(d) of the Municipal Code of Chicago does not violate either the federal or the Illinois Constitution, and reversed the circuit court's constitutional rulings. (App. 92-124.) The court of appeals did not reach the merits of LLCC's decision to revoke Pooh Bah's liquor license. (App. 123-24.) The appellate court remanded for further proceedings on remaining undecided issues.

Pooh Bah then sought and was granted review in the Supreme Court of Illinois. On October 5, 2006, the Supreme Court of Illinois affirmed the decision of the Appellate Court as to the constitutionality of § 4-60-140(d) under the Illi-

nois Constitution and under the United States Constitution. (App. 1.) Pooh Bah then sought rehearing, which was denied on March 5, 2007, over the objection of Justice Freeman. (App. 64-91.) This petition follows.

STATEMENT OF FACTS

Since 1993, Pooh Bah Enterprises, Inc. ("Pooh Bah"), has operated a gentlemen's club in an industrial area adjacent to a rail spur and the Chicago River on the north side of Chicago (the "Club"). The Club presents non-obscene erotic dancing as entertainment.

From the outset of this litigation, Petitioners raised the issue whether Pooh Bah and its dancers have a First Amendment right to present erotic dance performance even though the dancers' buttocks and the sides of their breasts are more scantily clad than the City of Chicago regulations (in § 4-60-140(d)) mandate in establishments licensed to sell alcoholic drinks—or, conversely, whether the City can regulate the body coverage of sexually-oriented live dance performers in City-licensed establishments. In particular, Pooh Bah raised the question whether the City's regulations are content-based or content-neutral, and whether the City had met its burden to show that the regulations were necessary and effective to combat adverse secondary effects. The Coverage Ordinance was adopted by the City in 1978 without legislative findings, but with the stated purpose to "control[] the form of entertainment" in venues that serve alcohol. (App. 157.)

In 1992, before adopting the gentlemen's club entertainment format, Pooh Bah met with the City Zoning Administrator, the Director of the LLCC, the Director of the Illinois Liquor Control Commission, and the district police commander, seeking guidance as to what was permissible. Pooh Bah sought to explain its business plan and to ascertain and resolve any regulatory issues. The LLCC Director was asked

for an opinion concerning the requirements for coverage. [1] The LLCC declined to give an opinion as to what was permissible.

At all times, Pooh Bah has maintained all necessary licenses, including a City liquor license, a City late-hour license, and a City music and dance license. It also has obtained two City amusement licenses that permit Pooh Bah to present stage dancing to its patrons. Because Pooh Bah has a City tavern license, a person under age 21 cannot enter unless accompanied by a parent or legal guardian. (RA. C00407.) The Club occupies a two-level industrial building. The first floor contains a bar, the main stage and two side stages, with tables for patrons. (SR. 00165.) The second floor consists of a large dressing room for the dancers.

Pooh Bah's Club is located in a leased building in a C3-2 commercial-manufacturing zone that permits a nightclub that sells alcohol and features entertainment. The Club also complies with Chicago's 1993 adult use (dispersal) zoning ordinance.[2] (SR. C00410.) The Club is in a non-residential zone. (R. 02848, 02875.) On the west side of Kingsbury Street, across from the Club, the zoning classification was M3-4 (heavy manufacturing) and that property, adjacent to

---

[1] (SR. 00417-18.) "SR." denotes the Petitioner's citations to six volumes of Supplemental Record submitted to the Appellate Court of Illinois by agreement of the parties. "R." denotes the Petitioner's citations to the record of proceedings from the Circuit Court of Cook County, Illinois. "RA" denotes citations to the Record on Appeal submitted by the City to the Appellate Court of Illinois. Record citations that include a "C" prefix refer to filings.

[2] The City's "adult use" zoning regulations adopted in 1993 are not at issue in this case. At all times, Pooh Bah has been in compliance with all City zoning regulations. In 2004, Chicago adopted a new comprehensive zoning ordinance that altered the designations of its zoning districts. However, this did not change the zoning treatment of the area where Pooh Bah is located. For the sake of clarity, where this petition refers to zoning designations it uses the ones that were in effect from 1955-2004.

the Chicago River, was improved with a zinc factory. (*Id.*) Adjacent to the Club on the north, south, and east are manufacturing and commercial uses. To the north are primarily drink and entertainment venues. (SR. 00406-07; R. 02853, 02875-77.)

Pooh Bah's entertainment format features several female entertainers dressed in gowns, dresses or pant suits performing a dance show to a set of three songs on the main stage. (R. 158-59.) During the first two songs, the dancers typically remove some of their clothing so that during the third song each is wearing a thong covering below the waist and latex rubber covering portions of their breasts. (*Id.*) After the group stage dances, the dancers are available for dances that are performed adjacent to a patron's table for a tip, usually $20 per dance. (R. 00160, 00166.)

Pooh Bah's Club does not present nude entertainment and has never sought to present total nudity. This litigation has focused entirely on the City's claim that the dancers' buttocks and the sides of their breasts were not sufficiently covered. The trial court found that there was no violation of the requirements for breast coverage, App. 136-39, but the Illinois Supreme Court adopted a more expansive construction of the Coverage Ordinance. (App. 121-23.)

As noted above, this case has a long procedural history. The appeals that are before this Court stem from two separate City efforts to enforce the body coverage requirements of § 4-60-140(d) by shutting down Pooh Bah or by enjoining Pooh Bah's business: (1) the 1993 license revocation administrative action and (2) the 1999 injunction action.

The City has also abandoned several factual claims and legal theories along the way. The City had initially included an "obscenity" claim under the Illinois statute, which it dropped early in the 1993 Case. (R. C1163.) During the trial in 1999-2000, the City made strenuous efforts to show that

Pooh Bah's dancers' breasts were not covered "opaquely" but that charge was explicitly abandoned mid-trial. In addition, the City originally alleged that the presence of the Club depressed property values in the area, but subsequently dropped this claim.

The 1999 (nuisance) Case went to trial on the City's preliminary injunction motion. During the incomplete trial, the trial court heard 15 witnesses for the City before it rested, and 13 witnesses for Pooh Bah, which did not finish presenting its case when a directed finding was entered that the Coverage Ordinance is unconstitutional. In a written decision, App. 133, 147, the trial court concluded, *inter alia*:

> [T]he City has not even come close to demonstrating the existence of or even the possibility of the existence of these effects. The Court finds the record devoid of any proof of the existence of even potentially harmful secondary effects.

The 1999 trial covered two main issues: (1) the constitutionality of the City's Coverage Ordinance and (2) the City's charge that a Club dancer had solicited two undercover police officers for prostitution. (R. C00003.) After hearing testimony from, among others, the officers and the accused dancer (a computer-studies masters degree candidate at DePaul University), the trial judge rejected the City's solicitation claim, and concluded that "undercover police officers . . . tried to entrap the dancers in attempt to show prostitution and solicitation. According to the clear evidence presented . . ., the dancers were not interested. The police tried using video cameras in their neckties—James Bond style—to show violations. That failed too." (App. 142.) The City did not appeal this issue.

The City appealed the constitutional rulings and the Illinois Appellate Court reversed the trial court. The appellate panel held that intermediate scrutiny was the appropriate First Amendment standard of review. (App. 109-11.) The Appel-

late Court found it "entirely reasonable and rational for the City to conclude that combining alcohol with nudity produces adverse secondary effects . . . even in the absence of specific studies on the matter." (App. 112-14.) Nevertheless, it remanded the matter for further determinations by the trial court. (App. 122-24.)

The Illinois Supreme Court affirmed, and rejected Pooh Bah's claim that it should be permitted to introduce additional evidence on remand on the secondary effects issues. Instead, the Court held that "the constitutionality of the ordinance is no longer subject to dispute." (App. 63.) Applying intermediate scrutiny review, the court stated "that liquor and sex are an explosive combination is a proposition so frequently confirmed by human experience that it can scarcely be questioned." (App. 37) (citations omitted) Notwithstanding the findings of the trial court, the Illinois Supreme Court concluded "that the evidentiary record . . . supported the proffered rationale for the ordinance." (App. 27.)

Justice Freeman dissented from the court's denial of rehearing. In contrast to his earlier vote to affirm the appellate court, Justice Freeman wrote that the City had not shown that the Coverage Ordinance has a content-neutral purpose, and that the appellate courts had upheld the law based solely on anecdotal evidence of supposed primary effects of the combination of alcohol and live erotic entertainment. (App. 65-66, 68.) Additionally, he disagreed with the majority because the court failed to give weight to the circuit court's finding that the record was devoid of proof of adverse secondary effects, and had cut off Pooh Bah's right to present evidence challenging the City's justifications. (App. 71-77.)

REASONS FOR GRANTING THE WRIT

I. CERTIORARI SHOULD BE GRANTED TO RESOLVE AN ISSUE OF NATIONAL IMPORTANCE THAT HAS DIVIDED THE CIRCUIT COURTS CONCERNING THE APPROPRIATE LEVEL OF SCRUTINY IN EVALUATING CONTENT-CORRELATED REGULATION OF SEXUALLY-ORIENTED EXPRESSION

This Court has held consistently that when government regulation of sexually-oriented speech is predicated on the content of expression, it must be subjected to strict First Amendment scrutiny. *United States v. Playboy Entertainment Group*, 529 U.S. 803, 811, 814-815 (2000) (Where "[t]he overriding justification for the regulation is concern for the effect of the subject matter on . . . viewers, [a regulation] is not 'justified without reference to the content of the regulated speech'" and must satisfy strict scrutiny.); *Ashcroft v. ACLU*, 542 U.S. 656, 660 (2004) ("the Constitution demands that content-based restrictions on speech be presumed invalid").

The basic constitutional principle applies equally to efforts to regulate expressive conduct, *RAV v. City of St. Paul*, 505 U.S. 377, 382 (1992), including adult entertainment and erotic dancing, where the regulation is content-based. *See, e.g., City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425, 434 (2002) ("If the regulation were content-based, it would be considered presumptively invalid and subject to strict scrutiny."); *City of Erie v. Pap's A.M.*, 529 U.S. 277, 289 (2000) ("If the government's interest is related to the content of expression . . . then the regulation falls outside the scope of the *O'Brien* test and must be justified under a more demanding standard."); *City of Renton v. Playtime Theaters, Inc.*, 475 U.S. 41, 46-47 (1986) ("regulations enacted for the purpose of restraining speech on the basis of its content presumptively violate the First Amendment").

As a "specific exception" to this bedrock rule, this Court has subjected regulations of expressive conduct only to intermediate constitutional scrutiny where they were adopted not to restrict speech but to combat content-neutral "secondary effects" of expression. *RAV v. St. Paul*, 505 U.S. at 394. This exception has been articulated most frequently in the context of adult entertainment regulations and zoning restrictions. *See, e.g., Young v. American Mini Theatres, Inc.*, 427 U.S 50 (1976); *City of Renton*, 475 U.S. at 47; *Alameda Books, Inc.*, 535 U.S. at 434; *Pap's A.M.*, 529 U.S. at 289; *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560 (1991).

While the "secondary effects" exception is well established, it is neither well understood nor consistently applied. As this Court observed in *Renton*, ordinances that treat "theatres that specialize in adult films differently from other kinds of theatres" do not "fit neatly into either the 'content-based' or the 'content-neutral' category." *Renton*, 475 U.S. at 47. More recently, several Justices have begun to question the shorthand designation of such ordinances as "content-neutral." *Alameda Books*, 535 U.S. at 448 (Kennedy, J., concurring) ("The Court appears to recognize that the designation was something of a fiction" that "is perhaps more confusing than helpful."); *id.* at 457 (Souter, J., dissenting) ("It would in fact make sense to give this kind of zoning regulation a First Amendment label of its own" such as "content correlated."). *See Joelner v. Village of Washington Park*, 378 F.3d 613, 621 (7th Cir. 2004) ("'content neutrality' is a concept easily and oft confused").

Because of this doctrinal ambiguity, it often is difficult to determine when a "content correlated" restriction on expressive speech may be subject only to intermediate scrutiny as opposed to strict scrutiny. In cases involving such laws, the First Amendment does not permit the government to presume that expressive conduct falls into a "proscribable category."

RAV v. St. Paul, 505 U.S. at 394; *Virginia v. Black*, 538 U.S 343, 365-366 (2003). To the contrary, the presumption runs the other way. The First Amendment requires reviewing courts to be skeptical of any attempts to discriminate between speakers or messages based on content. *See Minneapolis Star v. Minnesota Comm'r of Revenue*, 460 U.S. 575, 592-593 (1980); *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 230 (1987). This Court has held emphatically that the government bears the burden of proof, regardless of the level of scrutiny. *Black*, 538 U.S. at 367 (presumption that cross burning is "intended to intimidate" is "unconstitutional on its face" because "[t]he First Amendment does not permit such a short cut.").

Specifically with regard to adult entertainment, this Court has held that the government "bears the burden of proving evidence that supports a link between . . . such operations and asserted secondary effects." *Alameda Books*, 535 U.S. at 437 (plurality op.); *id.* at 449 (Kennedy, J., concurring) ("a city must advance some basis to show that its regulation has the *purpose and effect* of suppressing secondary effects, while leaving the quantity and accessibility of speech substantially intact") (emphasis added). *See also R.V.S., L.L.C. v. City of Rockford*, 361 F.3d 402, 408 (7th Cir. 2004) ("only after confirming that a zoning ordinances's purpose is to combat the secondary effects of speech do we employ *Renton's* intermediate scrutiny test").

This Court has not yet clarified when a government that has failed to meet its burden of proof with respect to secondary effects necessarily must satisfy strict scrutiny to support a content-based regulation of speech. For example, the district court in *Alameda Books* subjected the Los Angeles ordinance at issue there to strict scrutiny after the city failed to substantiate its "content-neutral" justifiations, but the court of appeals affirmed on different grounds, and the issue was not presented to this Court. *Alameda Books*, 535 U.S. at 433.

See Alameda Books, Inc. v. City of Los Angeles, No. CV 95-7771-DDP (C.D. Cal., May 28, 1998) ("the City's failure to demonstrate a genuine issue of fact as to the content-neutral justification . . . requires analysis of the ordinance as a presumptively invalid prior restraint"). As a consequence, lower courts lack meaningful guidance for when they must apply strict scrutiny in cases involving sexually-oriented expressive conduct.

In this case, for example, the Illinois Supreme Court upheld the Chicago ordinance under intermediate scrutiny. (App. 25-30, 36.) It did so despite the fact that the city council offered no contemporaneous legislative findings for the Coverage Ordinance to support the 1999 claim that it was intended to combat secondary effects, and notwithstanding legislative history that suggested that the purpose underlying the ordinance was content-based. *See* Journal of the Chicago City Council, January 17, 1978, at 722 (Report of the Committee on Police, Fire and Personnel, recommending the approval of the coverage ordinance because it "controls the form of entertainment" in liquor venues). (App. 157.) The Illinois Supreme Court cited the preamble to the later-enacted 1993 zoning ordinance as a statement of legislative purpose, App. 35, 36, but as Justice Freeman observed, "[t]he findings on which this court's opinion relies focus on the City's justification for enacting the [1993] *zoning* restrictions, rather than for the earlier-enacted coverage ordinance." (App. 79) (Freeman, J. dissenting) (emphasis in original).

Evaluating the City's proffer of post-enactment evidence of secondary effects, the trial court below held that the record was "devoid of any proof of the existence of even potentially harmful secondary effects." (App. 76.) Nevertheless, the appellate courts disregarded this finding, concluding instead that "it can scarcely be questioned" that "liquor and sex are an explosive combination." (App. at 37.) (citations omitted)

Justice Freeman examined this rationale and reasoned that the majority's conclusion should have triggered analysis "of whether strict scrutiny review is applicable in this case" because the decision rested on "anecdotal evidence of the supposed *primary* effects of the combination of alcohol and live seminaked dancing on its viewers." (App. 68) (Freeman, J. dissenting) (emphasis in original). *Compare Playboy Entertainment Group*, 529 U.S. at 811 ("The overriding justification for the regulation is concern for the effect of the subject matter on young viewers. . . . This is the essence of content-based regulation."); *Pap's A.M.*, 529 U.S. at 291 (Erie did not "attempt to regulate the primary effects . . ., *i.e.*, the effect on the audience of watching nude dancing in its ordinance"); *Boos v. Barry*, 485 U.S. 312, 321 (1988) ("[t]he emotive impact of speech on is audience is not a 'secondary effect'"). However, the Illinois Supreme Court majority dismissed this argument regarding the appropriate level of scrutiny in a cursory footnote. (App. 26)

The decision below in this case illustrates how a general lack of guidance has spawned a conflict among lower courts, including the federal circuit courts, about how to analyze the appropriate level of scrutiny and the nature of the evidence courts should examine. For example, unlike the Illinois Supreme Court in this case, the Eleventh Circuit rejected the argument that reviewing courts "should simply assume that the legislature's purpose was to combat the negative impact on health, safety, and welfare allegedly caused by venues that provide nude dancing." *Ranch House, Inc. v. Amerson*, 238 F.3d 1273, 1282-83 (11th Cir. 2001). *See also G.Q. Gentlemen's Quarters, Inc. v. City of Lake Ozark*, 83 S.W.3d 98, 102-103 (Mo. 2002) (court was unwilling "to presume that the City enacted [a regulation of erotic dancing where liquor is served] to prevent negative secondary effects," and therefore concluded that "the City had the heavy burden of justifying the ordinance under strict scrutiny"). Similarly, the Third Circuit rejected the application of *Renton* to a content-

based adult use zoning restriction and applied strict scrutiny after finding that "a regulation that singles out non-obscene sexually explicit material because of its impact on minors is not content-neutral." *U.S. Sound & Service Inc. v. Township of Brick*, 126 F.3d 555, 559 (3d Cir. 1997) ("[t]he impact of protected speech on minors is a direct, rather than a secondary, effect").

By contrast, other circuits have adopted intermediate scrutiny as the presumptive standard of review for otherwise content-based regulations of erotic expression. In *Illusions-Dallas Private Club, Inc. v. Steen*, 482 F.3d 299, 309 (5th Cir. 2007), the Fifth Circuit held such a regulation content neutral even though the regulation itself "references content" and "even without a legislative record to suggest a purpose unrelated to speech." It used intermediate scrutiny to review an ordinance that prohibited sexually oriented businesses from obtaining or renewing licenses to serve alcohol, even though the court also found that "there simply is *no evidence*" to support a link "between the combination of alcohol service and erotic dancing and negative secondary effects." *Id.* at 310, 313 (emphasis in original). Similarly, in a case cited by the Illinois Supreme Court below as its principal authority, the Seventh Circuit found that "state regulations prohibiting the sale or consumption of alcohol on the premises of adult entertainment establishments *must* be analyzed in light of *American Mini Theatres* and *Barnes*, as modified by their respective progeny." *Ben's Bar, Inc. v. Village of Somerset*, 316 F.3d 702, 712 (7th Cir 2003) (emphasis added). *See also Cafe 207, Inc. v. St. Johns County*, 856 F. Supp. 641, 644 n.3 (M.D. Fla. 1994), *aff'd*, 66 F.3d 272, 273 (11th Cir. 1995) (*per curiam*), *cert. denied*, 517 U.S. 1156 (1996) (intermediate scrutiny applies to ordinance limiting adult entertainment even if it is "specifically aimed" at the expressive activity of a particular individual).

The circuit courts also are divided on the related question of whether a municipality can use post-enactment evidence alone to satisfy *Renton*'s burden to show the predominant purpose of a "content correlated" ordinance is to combat secondary effects. *See, e.g., White River Amusement Pub, Inc. v. Town of Hartford*, 481 F.3d 163, 171 (2d Cir. 2007) (requiring "pre-enactment evidence" and collecting circuit cases discussing this requirement); *Peek-a-Boo Lounge of Bradenton, Inc. v. Manatee County, Fla.*, 337 F.3d 1251, 1268 (11th Cir. 2003) ("this Court has consistently interpreted *Renton* to require pre-enactment evidence"), *cert. denied*, 541 U.S. 988 (2004). *But see Illusions-Dallas Private Club, Inc.*, 482 F.3d at 310 (no pre-enactment record is required for "content-neutral" treatment); *Phillips v. Borough of Keyport*, 107 F.3d 164, 178-179 (3d Cir. 1997) (en banc) ("[W]e believe that insistence on the creation of a legislative record is an unwarranted intrusion into the internal affairs of the legislative branch of governments."), *cert. denied*, 522 U.S. 932 (1997); *DiMa Corp. v. Town of Hallie*, 185 F.3d 823, 829-30 (7th Cir. 1999) ("[A] municipality may make a record for summary judgment or at trial with evidence that it may not have had when it enacted its ordinance."), *cert. denied*, 529 U.S. 1067 (2000).

In sum, this Court's guidance is sorely needed on a question that goes to the heart of the First Amendment's prohibition of content-based regulation of protected expression. This is a critical issue, both because of the significant number of cases in federal and state courts involving the regulation of adult entertainment, and because content-based regulations with assertedly neutral purposes may be used as "a covert attack on speech" unless there are adequate safeguards. *Alameda Books*, 535 U.S. at 447 (Kennedy, J., concurring). Accordingly, this Court should grant review.

II. CERTIORARI SHOULD BE GRANTED TO REVIEW WHETHER REGULATION OF EROTIC ENTERTAINMENT IS CONSTITUTIONALLY PERMISSIBLE WHEN THE "RECORD IS DEVOID OF THE EXISTENCE OF EVEN POTENTIALLY HARMFUL SECONDARY EFFECTS" AND THE CHALLENGER IS NOT GIVEN A FULL OPPORTUNITY TO CHALLENGE THE GOVERNMENT'S JUSTIFICATION FOR THE LAW

This Court has upheld the constitutionality of local ordinances regulating adult entertainment in a number of cases, *e.g.*, *Alameda Books, Inc.*, 535 U.S. 425 (zoning, anti-concentration); *Pap's A.M.*, 529 U.S. 277 (nudity); *Barnes*, 501 U.S. 560 (nudity); *Renton*, 475 U.S. 41 (zoning); *Young*, 427 U.S. 50 (zoning), but these decisions have not produced a clear body of law. But while *Renton* produced a majority opinion, subsequent cases that have attempted to apply its teachings have resulted in sharply conflicting pluralities. *See, e.g.*, *Barnes*, 501 U.S. at 562 (three Justice plurality); *Pap's A.M.*, 529 U.S. at 282 (four Justice plurality). *See also Young*, 427 U.S. at 52 (four Justice plurality). The cases have focused on the legislative justifications proffered and the evidence presented to support the conclusion that the regulation was necessary and effective to combat adverse secondary effects.

Most recently, this Court has sought to clarify that when a challenger succeeds in casting doubt upon a city's justification for such an ordinance, the burden of proof shifts back to the government. *Alameda Books*, 535 U.S. at 439. *See id.* at 453 (Kennedy, J., concurring) ("If these assumptions can be proved unsound at trial, then the ordinance might not withstand intermediate scrutiny."). However, it has not yet explained the point at which there is sufficient "doubt" about the government's asserted rationale to require it to present

additional evidence, or whether a reviewing court may cut short a challenger's ability to present evidence questioning the proffered reasons for the law. Because there is significant disagreement among the lower courts on these issues, this Court should grant review in this case.

A. Review Should Be Granted Where the Trial Court Found That the Record is Devoid of Evidence of Harmful Secondary Effects

It is the City's burden to demonstrate that a proposed regulation of expressive conduct is intended to combat adverse secondary effects. Typically, local governments are permitted to point to a wide variety of materials to support such a claim, including the text of the ordinance, legislative findings or preamble, or any studies or findings about which the legislators were aware. *Alameda Books*, 535 U.S. at 438. However, local governments are not permitted to get away with "shoddy data" to support such laws, and where a challenger succeeds in casting doubt about the justifications for the law, the government must provide credible evidence to support the law. *Id.* at 439.

This case presents the issue of whether a City regulation of expression may be upheld when a trial court finds that there is *no* evidence of harmful secondary effects emanating from the regulated expressive activity (after the government rested its case). (App. 147.) There was no statement of purpose for the 1978 Coverage Ordinance—apart from the description that it was designed to control the "form of entertainment" where alcohol is sold—and no legislative findings. Instead, the Illinois Supreme Court pointed to legislation adopted 15 years later, *i.e.*, the preamble of "a package of ordinances and ordinance amendments adopted in 1993 to establish 'adult uses' within various zoning districts in the City" as supporting the existence of secondary effects. (App. 32.) *But see* App. 77 (Freeman, J., dissenting) (1993 zoning ordinance

"adopted location and dispersion regulations for adult uses in the city").

None of this Court's prior cases directly address this situation. For example, in *City of Erie v. Pap's A.M.*, the plurality opinion accepted the city's rationale that the regulation of nude dancing was necessary to prevent adverse secondary effects, but acknowledged that "Kandyland has never challenged the city council's findings or cast any specific doubt on the validity of those findings." *Pap's A.M.*, 529 U.S. at 284. Likewise, in *Alameda Books*, the plurality opinion focused on a study done by the city as a basis for justifying a zoning restriction on the location of adult entertainment establishments. However, according to the plurality neither the challenger nor the dissenting opinions offered data or competing theories to undermine the study upon which the city relied. *Alameda Books*, 535 U.S. at 437. Still, the case was remanded for further evidence on these factual issues.

This case thus poses the threshold question of whether a city ordinance may be upheld where the trial court has held that the record is "devoid of any proof of the existence of even potentially harmful secondary effects." (App. 76.) In addition, both Illinois reviewing courts below upheld the ordinance without requiring any evidence that the additional covering of the buttocks (or sides of breasts) required by the Chicago ordinance would have the slightest effect on secondary effects or that there had been any adverse secondary effects in the many years that the Club operated.

In this case, the government's justifications unraveled throughout the course of the litigation. The City initially claimed lower property values and community deterioration as adverse secondary effects to be targeted by the Coverage Ordinance, but later abandoned any claim that such effects were at all "associated" with the gentlemen's club. No evidence was presented to support the City's claims regarding

lower property values. It also argued that the ordinance was necessary to combat crime—prostitution in particular—but the City could not show an increase in such activity in the vicinity of the Club. The City also failed in its attempt to use undercover police to entrap the dancers. (App. 142.) Given the City's evidentiary failures and shifting rationales, this case places in bold relief the question left open in *Alameda Books*: What must a challenger do to "cast doubt" upon a city's assertions that a law is needed to combat adverse secondary effects?

The absence of the targeted secondary effects presents fundamental questions of First Amendment jurisprudence that the Court has not clearly addressed, and on which it has not provided guidance to the lower courts. Clarification of the government's burden, and of the effect of rebutting evidence on these threshold points by a challenger would provide valuable guidance to the lower courts as well as to local governments and the erotic entertainment industry. This is an especially pervasive issue throughout the country in light of the decades of local regulation of adult enterprises, especially the "adult zoning" ordinances adopted following *Renton* and the regulation of erotic dancing after *Barnes*.

B. This Court Should Grant Review Where Appellate Courts Cut Short Petitioners' Ability to Present Evidence Challenging the City's Justifications for the Law

This case also presents an important procedural question of First Amendment litigation: whether reviewing courts can rule in favor of the government—and "finally" uphold a law regulating expression—without allowing completion of the trial. This issue is acute in a case like this, where the Illinois reviewing courts refused to allow the challenger to complete its evidentiary attack on the government's *prima facie* justification (taking those courts' rulings to be, in effect, a

finding that the City made out a *prima facie* case for the ordinance).

The trial court in this case granted Pooh Bah's motion for a directed finding before Pooh Bah completed presenting its case. The directed finding order was "subject to reservations by all parties of their respective rights to present additional evidence if these motions are not finally dispositive." (App. 126.) Reversing the trial court's conclusion on an incomplete record, the Illinois reviewing courts upheld the constitutionality of the challenged ordinance without allowing Pooh Bah a full opportunity to rebut the City's evidence. (App. 63.) At the very least, Pooh Bah should have been able to finish presenting its evidence before the fact-related issues were "finally" decided against it.

In *Alameda Books,* the Court remanded the case for a trial for the City to prove the adverse secondary effects that it asserted. Justice Kennedy, concurring in the judgment, concluded by noting that if the City's "assumptions can be proved unsound at trial, then the ordinance might not withstand intermediate scrutiny." 535 U.S. at 453. Here, however, the court below cut off petitioner's right to present additional evidence and simply decreed that "the constitutionality of the ordinance is no longer subject to dispute." (App. 63.)

Given its unfinished evidentiary record, this case presents a far more onerous judicial treatment of First Amendment rights than this Court has previously confronted in dealing with issues concerning adult entertainment. May an appellate court uphold a regulation of the amount of covering worn by dancers when a trial court finds that there is no evidence whatsoever of any harms and without remanding for completion of the trial? In *Alameda Books*, the plurality opinion stressed that the secondary effects doctrine does not mean "that a municipality can get away with shoddy data or reasoning. The municipality's evidence must fairly support

the municipality's rationale for its ordinance." *Id.* at 438-39. But if challengers cannot present their rebuttal of a municipality's evidence, then municipal regulation will win by default even if its justification is shoddy or presumptive.

In addition to the First Amendment problem set forth in *Alameda Books*, the denial of Pooh Bah's right to present its remaining evidence on the secondary effects issues raises a serious due process question under the Fourteenth Amendment. As this Court has made clear, such due process questions raised in First Amendment cases "assume an importance fully as great as the validity of the substantive rule of law to be applied." *Speiser v. Randall*, 357 U.S. 513, 520 (1958). *See Hudson v. Chicago Teachers Union Local No. 1*, 475 U.S. 292, 303 n.12 (1986) ("[P]rocedural safeguards often have a special bite in the First Amendment context.") (quoting G. Gunther, CASES AND MATERIALS ON CONSTITUTIONAL LAW 1373 (10th ed. 1980)). Accordingly, this Court should grant review of this important question.

C. Lower Courts Are Divided on the Nature and Extent of Proof Necessary to Support Local Regulation of Sexually Oriented Businesses

This case presents an issue of national importance because cities across the country have laws regulating adult entertainment establishments. As a consequence, review would provide essential guidance and clarification as to the type of regulations that are permissible and the amount of evidence required to sustain them. Such guidance is needed because a significant split in the lower courts has developed on exactly these issues.

Some lower courts have invalidated adult entertainment regulations when there is no evidence to support them. For instance in *Flanigan's Enterprises, Inc. v. Fulton County, Georgia*, 242 F.3d 976, 985 (11th Cir. 2001), the court noted that there must be "some factual basis for the claim that

[adult] entertainment in establishments serving alcoholic beverages results in increased criminal activity." (quoting *Grand Faloon Tavern, Inc. v. Wicker*, 670 F.2d 943 (11th Cir. 1982)). The court invalidated the local ordinance and concluded: "Defendants may not ban nude dancing in establishments licensed to sell liquor without any factual basis to support the claim that these establishments are connected with negative secondary effects." 242 F.3d at 987.

The Eleventh Circuit's approach as articulated in *Flanigan's Enterprises* is directly in conflict with that of the Seventh Circuit in *Ben's Bar*, which was the principal authority upon which the Supreme Court of Illinois relied. (App. 22-48.) *See Ben's Bar*, 316 F.3d at 726. The Eleventh Circuit struck down a regulation of nudity in an adult entertainment establishment because of the lack of evidence of harmful secondary effects, *Flanigan's Enterprises, Inc.*, 242 F.3d at 985-87, while the Seventh Circuit upheld such a regulation despite the absence of any evidence of harmful secondary effects emanating from erotic dancing. *Ben's Bar*, 316 F.3d at 726. The Illinois Supreme Court wholly embraced the Seventh Circuit's analysis. (App. 30.)

Contrary to the decision below, other courts have invalidated ordinances because of the lack of proof of harmful secondary effects. The Fifth Circuit recently overturned a district court's ruling upholding a regulation of alcohol service at an erotic dancing club and stressed that "there simply is *no evidence*, and the State has not met the minimal evidentiary burden placed upon it." *Illusions-Dallas Private Club, Inc. v. Steen*, 482 F.3d at 313 (emphasis in original). In another case, the Fifth Circuit similarly invalidated a zoning ordinance regulating adult entertainment and concluded "[b]ecause there is no such evidence in the record, we must strike down the zoning provision of the Ordinance." *Encore Videos, Inc. v. City of San Antonio*, 330 F.3d 288, 295 (5th Cir. 2003).

In sharp contrast, other courts, like the Seventh Circuit in *Ben's Bar* and Illinois appellate courts in this case, have upheld ordinances regulating adult entertainment without requiring proof of harmful secondary effects. *See, e.g., Heideman v. South Salt Lake City*, 348 F.3d 1182 (10th Cir. 2003); *Restaurant Ventures, LLC v. Lexington-Fayette Urban County Government*, 60 S.W.3d 572 (Ky. 2001).

Even within some reviewing courts, there have been marked inconsistencies between panels as to the required evidentiary burdens. The Seventh Circuit, which guided the Illinois courts' decision below, is a prime example. In *R.V.S., L.L.C. v City of Rockford*, 361 F.3d 402 the court invalidated Rockford's adult zoning ordinance for lack of justifying evidence and noted that the regulation of exotic dancers "targets speech itself." *Id.* at 414. In contrast, in *Ben's Bar*, 316 F.3d 702, the Seventh Circuit upheld an hours of operation ordinance on the bare presumption that there would be adverse secondary effects where exotic dancing and alcohol are combined. *Id.* at 725-726. The starkly inconsistent treatment of the evidentiary burdens in such cases, even within the same circuit, cries out for this Court's guidance.

CONCLUSION

This Court should grant review to clarify these First and Fourteenth Amendment issues that constantly recur throughout the country and that have produced significant splits of judicial opinion. For the foregoing reasons, Petitioners respectfully request that this Court grant review of this case.

Respectfully submitted,

MICHAEL A. ABRAMSON
ARNSTEIN & LEHR LLP
120 South Riverside Plaza
Suite 1200
Chicago, Illinois 60606
(312) 876-7155

ROBERT CORN-REVERE
Counsel of Record
DAVIS WRIGHT TREMAINE LLP
1919 Pennsylvania Avenue, N.W.
Washington D.C. 20006
(202) 973-4225

DAVID A. EPSTEIN
DAVID A. EPSTEIN, LTD.
30 North LaSalle Street
Suite 2900
Chicago Illinois 60602
(312) 553-1479

Counsel for Petitioners